In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2032

LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A, A1-A5) is not reported. The Board's decision and order (Pet. App. C, C1-C2) and the Trial Examiner's Decision, (Pet. App. C, C3-C20) are reported at 200 NLRB No. 159.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1974 (see Pet. 2). The petition for a writ of certiorari was filed on July 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the union violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act by threatening, and attempting to cause, the discharge of an employee for non-payment of union dues at a time when the union could not lawfully compel him to make such payment as a condition of employment.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 4.

STATEMENT

Illinois Bell Telephone Company[1] (the Company) provides telephone service in Decatur, Illinois (Pet. App. C, C4). For many years a contractual relationship has existed between the Company and petitioner Union. The relevant contract contains a maintenance-of-membership clause providing that all "employees" who become members of the Union "shall maintain their membership in the the Union in good standing as a condition of employment." The term "employee" is defined as an "employee * * * of the Company represented by the Union." (Pet. App. C, C5; G.C. Exh. 5, Art. I, Sec. 2, Art. II.)

Robert Galka first began working for the Company on September 1, 1959, as a frame man. He joined the Union in March 1960 (Pet. App. C, C5; Tr. 23).[2] On March 15,

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[1] Intervenor below.

[2] "Tr." refers to the transcript of the proceedings before the Administrative Law Judge; "G.C. Exh." refers to the General Counsel's Exhibits.

1968, Galka, then employed as a communications maintenance man, was promoted to station installation foreman, a supervisory position outside of the bargaining unit represented by the Union (Pet. App. C, C5; Tr. 23). In April 1968, Galka told Union steward Don Maddox that, "since I was in management and I wasn't in the Union anymore, that I would like to have my Union dues stopped." Galka did not sign a union withdrawal card, nor was such a card given to him but his dues were stopped; he stopped receiving union literature and, for the time, had no further contact with the Union (Pet. App. C, C6; Tr. 28-29).

In February 1969, Galka left his supervisory position and returned to a job within the bargining unit (Pet. App. C, C5; Tr. 24). In April, Union steward Jim Nalefskin told Galka that he had some cards for Galka to sign "in order * * * to get [Galka's] Union dues started again." Galka agreed but did not receive any cards or further communications from the Union (Pet. App. C, C6; Tr. 29-30).

Fourteen months later, in June 1970, Union steward Maddox told Galka that he was "in trouble" because he owed some "back dues." When Galka asked how he could owe any dues when he was not a member, Maddox replied that the Union had "automatically" reinstated him to membership when he returned to the bargaining unit in February 1969. Maddox told Galka to sign a payroll deduction card and the Union would bill him later for back dues. Galka replied that he would not sign anything under those circumstances. Maddox asked Galka if he "knew what this meant." Galka answered that he "didn't care what it meant." (Pet. App. C, C6; Tr. 30-31.)

On July 1, 1970, the Union, by letter, a copy of which was sent to Galka, requested the Company to discharge Galka if he refused to pay his back union dues immediately, pursuant to the "Union Security" provision of the collective bargaining agreement (Pet. App. C, C6-C7). Shortly afterwards, when Maddox asked Galka if he had received a copy of the letter, Galka stated that he had no objection to joining the Union. Maddox replied that that was not the issue, since Galka had automatically been carried as a member he was therefore obligated to pay back dues dating from his return to the bargaining unit. When Galka repeated that he did not owe any back dues, Maddox warned that Galka's "job was at stake and he would hate to see [Galka] lose [his] job for one hundred forty some dollars of back dues * * * " (Pet. App. C, C7; Tr. 32-33).

On July 30, 1970, the Company refused to comply with the Union's July 1 request to discharge Galka, stating that it would be "a violation of the National Labor Relations Act" to do so (Pet. App. C, C7-C8; Tr. 47-48). After several similar demands by the Union both to Galka and the Company (Pet. App. C, C8-C9; Tr. 24-25, 33-6, 49), Union attorney Robert Fitzgerald wrote Galka, stating that Galka was delinquent in his dues, from February 1969 to the present, and that the Union considered Galka to have been a member continuously from March 1960. The letter continued: "Unless you tender an amount of money equal to the dues owed or make mutually satisfactory arrangements for the payment thereof by December 11, 1970, I will be forced to take appropriate action on their behalf." (Pet. App. C, C9; Tr. 37.)

After conferring with the Company, Galka decided, in order to protect his job, to pay the back union dues and sign a payroll authorization card. On December 10, 1970, Galka met with Maddox; he signed a payroll deduction card and a check for $141.45, writing on the back of the check the words "paid under protest" (Pet. App. C, C9-C10; Tr. 40-42). Thereafter, the Company filed an unfair labor practice charge with the Board (Pet. App. C, C3).

The Board, adopting the findings of its Administrative Law Judge, concluded that, "when Galka left the bargaining unit in March 1968, to take a supervisory position with the Company, he did so with a *bona fide* intention of not returning, that his obligation to retain membership in the Union under the collective bargaining agreement ceased as of that time, and that, upon his return to his job within the bargaining unit in February 1969, he was in the position of a new employee, with no obligation under the contract to resume payment of union dues." Therefore, it held that in requesting the Company to discharge Galka because of his failure to tender union dues for which he was not obligated, the Union violated Section 8(b)(2) and (1)(A) of the Act. (Pet. App. C, C14.) The Board also found that the Union violated Section 8(b)(1)(A) by threatening Galka, through the letter of its agent, Fitzgerald, with discharge if he failed to pay union dues for which he was not obligated (Pet. App. C, C14-C15). The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practices found, to reimburse Galka for all union dues collected since December 10, 1970, and to advise the Company that no further dues deductions would be made from Galka's pay unless, and until, he executed a new payroll deduction card (Pet. App. C, C2, C17-C18).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A, A1-A5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Thus, no issue warranting further review is presented.

1. Section 8(b)(2) of the Act makes it unlawful for a union to cause, or attempt to cause, an employee's discharge for failure to pay dues or fees to the union, except where such obligation is sanctioned by a valid union security provision. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40. Under settled Board principles, an employee who terminates his relationship with an employer and is then rehired by him, or who transfers out of the bargaining unit and then returns to it, "stands in the same shoes as one being hired by the * * * Company for the first time, who has never been a member of the * * * Union" (*Convair*, 111 NLRB 1055, 1056) — insofar as application of a union security provision is concerned. See also *Kaiser Steel Corp.*, 125 NLRB 1039,1041; *Yellow Cab Co.*, 148 NLRB 620, 623-625. When Galka was elevated to the position of foreman, his status as an "employee" within the bargaining unit was terminated[3] just as it would have been had he left the Company and gone to work elsewhere. Therefore, the Board properly concluded that, when he rejoined the bargaining unit, he was entitled to a fresh choice, under the maintenance-of-membership clause of the contract (*supra*, p. 2), whether to rejoin the Union.

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[3] The contract defined "employee" as an "employee of the Company represented by the Union" (*supra*, p. 2). Section 2(3) of the Act excludes supervisors from the definition of "employee."

There is no substance to the Union's contention that the Board's decision allows an employee to "void the effect of valid internal Union rules concerning the retention of membership, by working as a supervisor and then returning to the bargaining unit" (Pet. 16). This contention is predicated on the Union's assertion, before the Board and the court below, that, although Galka had left the bargaining unit to become a supervisor, he remained subject to union membership obligations because he was put on "honorary withdrawal status." However, the Union's Constitution provides for two methods of conferring "honorary withdrawal status" on a member: by the issuance of an "honorary withdrawal" card, or by having a member "shown as on honorary withdrawal without actual issuance of the card" (Pet. App. D, D1-D2). The Board found, and the court below agreed, that Galka was neither issued an "honorary withdrawal" card, nor did the Union introduce any evidence to indicate that he was "shown on honorary withdrawal" (Pet. App. A, A4-A5; Pet. App. C, C11-C16).

2. Contrary to petitioner's contention (Pet. 8-12), the decision below does not conflict with *National Labor Relations Board* v. *Industrial Towel and Uniform Service*, 473 F. 2d 1258 (C.A. 6). In that case, employee Durham executed a check-off authorization that was self-renewing annually unless the signer took affirmative action. Durham left work in 1966 because of illness but returned in 1969, at which time the employer reinstated the dues checkoff without fresh authorization. The Sixth Circuit held that the Company did not act unlawfully. It found that the "unambiguous language" of the self-renewing checkoff was controlling, "since the parties were presumed to have known what

they were signing." *Id.* at 1260. Further, the court found that the circumstances surrounding Durham's leaving and re-employment indicated that neither the union nor the company treated her as a new employee. *Ibid.* In the instant case, there was no independent checkoff authorization. Moreover, when Galka left the bargaining unit for a supervisory position, he severed all connection with the Union (*supra,* p. 3). When he returned to the bargaining unit, the Company treated him as a new employee and the Union, except for an offer on which it did not follow through to bring him the cards necessary to "get [his] Union dues started again" (p. 3 *supra*), ignored him for 14 months and then sought to collect past dues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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